

Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010

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Abstract

There are various forms of justice. It cannot be limited to legal justice. This paper explores the potential of traditional justice systems under the Constitution. It illustrates the need for a multidisciplinary approach in order to fully realise the right to access justice. Through a comparative analysis as well as case law, the paper demonstrates how alternative dispute resolution is not limited to civil cases, but can be applied to criminal proceedings. Challenges are pointed out and recommendations made on how to improve and effectively manage traditional justice system.

Introduction

Kenya is a country diverse in race, culture, ethnicity and religion. The preamble to the Constitution of Kenya, 2010 (the Constitution) is instructive - the Kenyan people expressly acknowledge pride in their ethnic, cultural and religious diversity, and restate their determination to live in peace and unity. This Constitution represents what is referred to as a ‘*new people-based ideology*’¹ that embraces traditional dispute resolution mechanisms in addition to the formal justice mechanism. Traditional dispute resolution mechanisms are described in different ways. This paper uses the terms traditional justice system (TJS) and traditional dispute resolution mechanisms interchangeably. It argues that the reliance on

¹ Ojwang JB, *Ascendant judiciary in East Africa: Reconfiguring the balance of power in a democratising constitutional order*, Strathmore University Press, Nairobi, 2013, 39.

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one form of justice system to manage conflict resolution can impede access to justice. This is because if there is diversity in ethnicity, culture and religions, then it is essential that there be diversity in dealing with disputes. The drafters of the Constitution recognised this when they drafted Article 159(2)(c) of the Constitution which provides for traditional dispute resolution as an alternative dispute resolution mechanism. The structural outline of the paper is as follows: (i) justice and the legal system in Kenya; (ii) the differences between the formal and informal justice systems; (iii) TJS in Kenya; (iv) TJS and human rights principles; (v) a comparative analysis between Kenya and South Africa on TJS and; (vi), recommendations on the viability of simultaneously administering both formal and informal systems of justice.

The legal System in Kenya

Like in most African countries, Kenya is a pluralistic legal system. This means that there are several systems of law coexisting at the same time in the same jurisdiction among a common people.² It is the unique historical experience in most of Africa that has led to these mixed legal systems. However, differing legal systems also mean that there are conflicting claims to authority from one legal system.³ Predominantly, the challenge arises of one legal system being considered as superior to the others.

In pre-colonial Kenya, customary law and tradition was the predominant legal system which governed the way of life of the indigenous people; with elders resolving disputes through informal judicial systems.⁴ Tradition is defined widely to encompass: the customs and beliefs handed down, through word of mouth from generation to generation; or the body of long standing customs, beliefs and practices belonging to a particular group of people.⁵ The legal landscape changed when the British colonised Kenya and introduced the common law system. This led to plural judicial systems with separate laws governing Africans, Europeans,

² Pimentel D, 'Legal pluralism in post-colonial Africa: Linking statutory and customary adjudication in Mozambique' 14 *Yale Human Rights and Development Journal* 59 (January 2011), 3.

³ Tamanaha BZ, 'Understanding legal pluralism: Past to present, local to global', 30 *Sydney Law Review* (2008), 375.

⁴ Ojwang JB, *Constitutional development in Kenya: Institutional adaptation and social change*, ACTS Press, Nairobi 1990, 19-21.

⁵ Frémont J, 'Legal pluralism, customary law and human rights in francophone African countries' 40 *Victoria University of Wellington Law Review* 1 (2009), 150-151.

Muslims and Asians.⁶ The latter system of law was adversarial in nature and unlike the traditional one which was unwritten and usually handed down orally from generation to generation; the common law on the other hand was developed through precedent and written laws.⁷ Further, the colonialists wanted to control the indigenous people and therefore introduced a system of indirect rule where chiefs were appointed to govern and administer specific areas.⁸ Nevertheless, the introduction of this new legal system did not extinguish the traditional forms of dispute resolution.⁹

In order to regulate the traditions of the people, the colonialists limited traditional practices to those which were not repugnant to natural justice and morality. Kenya's 2010 Constitution continues to carry a similar provision as it limits the use of traditional dispute resolution mechanisms where they lead to outcomes that are repugnant to justice and morality.¹⁰ The Judicature Act¹¹ echoes the common law relied on by the colonialists; it provides that courts can apply African customary law to the extent that it is not repugnant to justice, morality or contrary to written laws. A judicial officer in the formal system usually applies the repugnancy rule to determine whether a traditional practice is acceptable. This rule provides that a tradition will only be considered if it meets the requirements of equity, good conscience and common sense.¹²

The Constitution recognises several sources of law. After entrenching its own supremacy,¹³ it provides that any law, including customary law, is applicable only to the extent that it does not contravene constitutional stipulations.¹⁴ Where customary law is in conflict with the Constitution it will be declared void to the extent of its inconsistency. Furthermore, customary international law and ratified treaties are also considered part of Kenyan law.¹⁵ Common law in the form of precedent and doctrines of equity are also recognised as a form of law, subject to the Constitution. The Constitution also provides that all lower courts

⁶ Ojwang, *Constitutional development in Kenya*, 152.

⁷ UNICEF, UNDP, UN WOMEN, *Informal justice systems: Charting a course for human rights-based engagement* (2012), 49.

⁸ Frémont, 'Legal pluralism, customary law', 155.

⁹ Frémont, 'Legal pluralism, customary law', 155.

¹⁰ Article 159(3) (b).

¹¹ Chapter 8, Laws of Kenya, section 3(2).

¹² Brobbey SA, *Explaining legal pluralism in African countries: Ghana as a case study*, (undated), http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_pt_br/anexo/Explaining_legal_pluralism_in_African_Countries_Ghana_as_a_case_study.pdf on 7 May 2014.

¹³ Article 2.

¹⁴ Article 2(4).

¹⁵ Articles 2(5) and (6) of the Constitution.

are bound by the decisions of the Supreme Court.¹⁶ These laws signify the many laws co-existing at the same time and in the same country, making Kenya a legal pluralistic society. It is therefore not practicable for one legal system to be applied as a means of administering justice, over and above others.

Justice in Contemporary Kenya

Injustice comes in several forms. Likewise, justice as a tool for addressing injustice can come in various forms. However it is difficult to find one common ground as the main cause of injustice.¹⁷ Similarly, in a pluralistic legal society, there is no single approach of administering justice which is collectively deemed as the key solution to justice. The Romans define justice to mean '*to give each his due*'. Amartya Sen argues that justice is not attained through reasoning, instead, it essentially involves being sensitive and keen to detect injustice.¹⁸ Justice can only be attained if a person is keen on the level of injustice that is occurring yet sensitive to the fact that one solution is insufficient to deal with all forms of injustice. Therefore, in order to administer justice effectively, it is necessary to incorporate TJS and other alternative justice systems into the formal justice system.

In Kenya, the most identified reference to justice is articulated in the third line of the national anthem which states that '*justice be our shield and defender*'. What then is justice in the legal pluralistic contemporary Kenya? This section will limit the discussion of justice to the Kenyan Constitution and its legal system. The aim of this is to illustrate the nexus between access to justice in the Kenyan legal system and to demonstrate that in order to improve access to justice, it is imperative to recognise other forms of legal systems.

Justice is not defined in the Kenyan Constitution. However, it is referred to in many constitutional provisions. In the Preamble, the Kenyan people expressly appreciate and aspire to *social justice* as an essential value; in Article 10(2) (b), *social justice* is recognised as a national value and principle of governance; Article 19(2) provides for the Bill of Rights as a tool to promote *social justice*; and Article 48 places an obligation on the State to ensure that all persons access justice. It is clear that the Constitution, not only refers to justice but social justice. Social

¹⁶ Article 163(7).

¹⁷ Sen A, *The idea of justice*, Belknap Press, Cambridge, Massachusetts, (2009).

¹⁸ Sen, *The idea of justice*.

justice is defined to mean equality in society or as ‘promoting a just society by challenging injustice and valuing diversity’.¹⁹

The most comprehensive provision in relation to justice, legal systems and judicial authority is provided under Article 159 of the Constitution. Article 1(3) (c) of the Constitution first identifies the sovereignty of the people and delegates to the Judiciary that power. Article 159(1) of the Constitution reaffirms that judicial authority vests with the people and is delegated to the courts and tribunals. Article 159(2) is instructive, as it provides the guiding principles that courts and tribunals must adhere to when administering justice. These principles are that justice must be done to all,²⁰ it must not be delayed²¹ or administered with undue regard to technicalities,²² courts must consider alternative methods of dispute resolution²³ and the purpose and principles of the Constitution must be promoted and protected when administering justice²⁴. Additionally, Article 159(3) of the Constitution provides limitations to the application of TJS mechanisms.

In spite of the above principles of justice under the Constitution, there are several challenges which hinder access to justice. Some of these are economic challenges such as expensive court fees, lengthy and complicated court rules and procedures, geographical and linguistic factors such as the use of legal jargon.²⁵

Formal Justice Systems versus Informal Justice Systems

Article 159(2) (c) of the Constitution classifies traditional dispute resolution mechanisms as a form of alternative dispute resolution mechanism (ADR). However, some scholars have argued that it is incorrect to classify a justice system with the term ‘alternative’. This is a correct analysis because, in some African countries where it is difficult to access the formal court systems, the only form of justice system known to the people is TJS; therefore it is not an alternative to any other system but the main system of dispute resolution.

¹⁹ Robinson M, *What is social justice?*, Department of Government and Justice Studies, Appalachian University, Blue Ridge Mountain North Carolina (2013), <http://gjs.appstate.edu/social-justice-and-human-rights/what-social-justice> on 9 November 2014.

²⁰ Article 159(2) (a), Constitution of Kenya (2010).

²¹ Article 159(2) (b), Constitution of Kenya (2010).

²² Article 159(2) (d), Constitution of Kenya (2010).

²³ Article 159(2) (c), Constitution of Kenya (2010).

²⁴ Article 159(2) (e), Constitution of Kenya (2010).

²⁵ Kurgat L, Ombui K, ‘Factors affecting service delivery in the judicial system in Kenya: A case of Makadara law courts’ 2 *International Journal of Science and Research* 10 (2010), 1-2.

On the contrary some authors, mostly from the commonwealth region argue that ADR cannot be an 'alternative' as this term can be positively misleading. Instead, they place reliance on court systems which they refer to as the main representation of the exercise of the sovereignty of the people. Thus, as Sir Laurence Street, Former Chief Justice of New South Wales stated, ADR should not be considered as an alternative to the court system, but rather an addition to the court system.²⁶

The formal justice system is considered formal because it is modern, state recognised, laws and cases are regulated and filed and there are accountability mechanisms in place to ensure that the laws are adhered to. Informal justice systems, on the other hand, are regarded as informal because they consist of other justice systems which are not State-recognised.²⁷ However, this argument is not entirely true because there has been development in the law in some African countries which now recognise traditional justice systems in the Constitution and in legislation. Therefore, this system is regarded as informal as it is neither monitored, nor supervised and there are no accountability mechanisms.

TJS are also referred to as non-state justice systems, informal justice systems or community arbitration.²⁸ There is no universal type of TJS; they vary depending on the numerous customs and traditions in existence. It is worth mentioning that informal systems of justice are not restricted to traditional justice systems. TJS also includes: community based dispute resolution systems, non-state justice systems or faith based justice systems, customary courts, community forums, and administrative authorities.²⁹ It essentially entails the adjudication of a dispute by a third party who is not a judicial officer and guided by traditions, customs or practices which are often not written in statute. Usually the customary courts and the administrative authorities are hybrids in nature as they are set up in conjunction with state organs. TJS has been defined as "all those people-based and local approaches that communities innovate and utilize in resolving localized disputes, to attain safety and access to justice by all".³⁰

Informal justice systems have been preferred by communities over formal justice systems mainly because they are inexpensive, familiar, and easy to use be-

²⁶ Law Reform Commission, *A report on alternative dispute resolution: Mediation and conciliation* (November 2010), 14.

²⁷ FIDA Kenya, *Report on traditional justice systems in Kenya: A study of communities in Coast Province*, 2010, 4.

²⁸ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, (2010), 2.

²⁹ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 2.

³⁰ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 1.

cause they understand the language of the proceedings and matters are dealt with expeditiously.³¹ To the contrary, formal justice systems are considered expensive, complicated to use, hindered by language barriers and plagued by delays in solving disputes due to backlog in cases.³²

Another major difference between the formal and the informal justice systems is that the formal justice systems are an adversarial process. In this adversarial process, there is usually a winner and a loser. Ordinarily, the loser has to compensate the winner for the loss and in criminal cases the accused has to suffer punishment for their actions. The main remedies in formal justice systems are considered punitive and retributive in nature. These proceedings are usually recorded and can be used by a party if the decision of a judge aggrieves them.³³

In contrast, informal justice systems are usually adjudicated by a group of people who are respected in a community.³⁴ They also sit and listen to the warring factions of a dispute and there is usually no record of the proceedings.³⁵ However, the proceedings take place in a language that is widely understood.³⁶ The process is through dialogue where the suspect and the victim and their families sit and are able to discuss the cause and consequence of the conflict. The adjudicators often guide the process and the remedies include forgiveness and payment of compensation where injury has occurred. The aim of resolving such a dispute is reconciliation.³⁷ The perpetrators are held accountable for their actions through the families and the community, who take responsibility to make sure that the conflict does not arise again. This is because the process is aimed at social cohesion.³⁸ Most of the proceedings in this form of systems are not recorded and may prove difficult for a party who wishes to rely on them.

In his speech during the *Induction Retreat for Cohesion and Integration Goodwill Ambassadors*, in Nairobi, on 29 August 2011, Kenya's Chief Justice advised the Kenyan people to avoid prolonged and expensive court processes and resort to traditional dispute resolution mechanisms. This statement by the Chief Justice is

³¹ UNICEF, UNDP, UN WOMEN, *Informal justice systems: Charting a course for human rights- based engagement*, (2012), 10.

³² ICJ-Kenya, *Strengthening judicial reform in Kenya: Public perceptions and proposals on the judiciary in the new constitution*, (May 2002), 7-8.

³³ UNICEF, UNDP, UN WOMEN, *Informal justice systems*, 11.

³⁴ Frémont J, 'Legal pluralism, customary law, 154.

³⁵ ICJ-Kenya, *Strengthening judicial reform in Kenya*, 7-8.

³⁶ UNICEF, *Traditional justice systems in the Pacific, Indonesia and Timor-Leste*, (2009), 4.

³⁷ UNICEF, *Traditional justice systems in the Pacific*, 5.

³⁸ UNICEF, *Traditional justice systems in the Pacific*, 4. See also Ozoemena RN, Hansungule M, *Re-envisioning gender justice in African customary law through traditional institutions*, (November 2009), 5.

indicative that more needs to be done to create awareness on the availability and advantages of using the informal justice systems such as TJS.

The Constitution of Kenya recognises traditional dispute resolution mechanisms enshrined under Articles 60(1) (g), 159(2) (e) and 159(3). Article 60(1) (g) states that: “land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in - encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.” Articles 159(2)(e) and 159(3) of the Constitution provide for traditional mechanisms as a means of alternative dispute resolution, which courts and tribunals need to consider when exercising their judicial authority and also the limitations of applying traditional dispute resolution mechanisms. As already stated, TJS varies depending on the community one lives in and the traditions and customary law that one adheres to. This paper will analyse the role of the council of elders as a vehicle through which traditional dispute resolution can be implemented.

The purpose and importance of TJS is mainly anchored in both the Preamble and Article 11(1) of the Constitution. The Preamble to the Constitution acknowledges that the people of Kenya are committed to promoting the well-being of the individual, family and the community. This statement points out the importance of culture in the African context and its links to the individual, family, community and traditional dispute resolutions mechanisms.

Article 11(1) in turn, “recognises culture as the foundation of the nation and as the cumulative civilisation of the Kenyan people and nation.” This provision also compels the state to promote all forms of cultural expressions.

As stated earlier the aim of TJS is to solve conflicts between parties with the inclusion of family and community structures. A reconciliatory approach is often used to solve disputes. This is strongly linked to the African context of togetherness, where the focus is on the community rather than the individual. In Swahili speaking cultures this is known as ‘*Ujamaa*’ whereas in South Africa it is known as ‘*Ubuntu*’. Put simply, ‘*I am because we are*’. It is this theme that promotes the need to elevate and create more awareness to TJS.

Customary law governs TJS. Customary law is the law which governs a traditional setting. The Constitution recognises customary law under Article 2(4) where it provides that any law, including customary law that is inconsistent with the Constitution shall be declared void to the extent of its invalidity. In the land-

mark South African case of *Bhe and Others v Khayelitsha Magistrate and Others*,³⁹ the Constitutional Court in determining the custom of primogeniture as being contrary to the right to equality enshrined in the Constitution, differentiated between two types of customary laws; official customary law and living customary law. Official customary law is the law which is recognised by a state in statute while living customary law is the law which is passed on from generation to generation. The Court held that it was difficult to determine the content of living customary law as it changed with times.

Customary law has a significant impact on TJS, since it is the cornerstone upon which decisions are made. Therefore, as we will discuss later, if a community relies on customary law and the council of elders makes a decision based on such a law, which is contrary to the Constitution, this will consequently influence the validity of such a law.

In Kenya, although the council of elders continues to resolve conflict, this system is not widely accepted as it sometimes clashes with the formal court system.⁴⁰ By and large, the council of elders is faced with different types of conflicts ranging from family disputes, land issues and criminal issues. However, when it comes to criminal issues, there is a discord between whether the TJS and the formal justice system has the power or jurisdiction over all criminal issues. In 2013, there were several consultative meetings organised by the Judiciary Training Institute to start a conversation on alternative justice systems. It involved stakeholders in the justice system such as academics, government officials, council of elders and civil society organisations. The aim of the meetings was to start a conversation on the importance of alternative justice systems as per Article 159(2) (c) of the Constitution. In the convening report of a meeting of council of elders on alternative justice systems held on 24 to 26 June 2013 and the Convening report of the meeting of government officials on alternative justice systems held on 14 November 2013, it was clear that there is need for legislation addressing TJS and there was concern raised by judicial officers that the informal justice system was ill equipped and lacked the capacity and jurisdiction to manage serious crimes such as capital offences. However, the Office of the Director of Public Prosecution First Progress Report 2011-2013 recommends that in order to give effect to Article 159 of the Constitution, all stake holders must participate in developing guidelines for dealing with TJS in criminal justice.

³⁹ (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

⁴⁰ Judiciary Training Institute, 2013.

There are implementation challenges facing TJS. Some argue that customary laws are repugnant to justice and morality and that some practices are contrary to human rights principles. Article 159(3) of the Constitution provides these limitations for the application of TJS systems. It states that TJS will not be used if the results contravene the Constitution, are repugnant to justice and morality, and are contrary to any written law. The rule of repugnancy is however, difficult to implement because morality is relative, more so in a modern set up. What is repugnant to one person in a modern set up is not repugnant to another person in a traditional set up. This rule was introduced to invalidate and limit any traditional laws practiced by the indigenous African communities which they were not comfortable with.

Scholars such as Ozoemena and Hansungule have opposed this repugnancy rule and stated that customary law is misinterpreted and in some instances it is forward looking.⁴¹ This is an important argument, especially in the area of TJS where communities such as the nomadic communities in Northern Kenya have devised mechanisms for dealing with conflict affecting natural resources between two communities.⁴² In these circumstances, the council of elders in two separate communities preside over the contentious matter. Further, in some communities, the female elders fiercely protect the right of women especially in disputes relating to the private life.⁴³

Traditional Justice Systems and Human Rights

The Bill of Rights in the Constitution provides for a myriad of rights some of which were never previously recognised. One such right is the right to culture, provided under Article 11. Exercising the right to culture includes recognising their respect and adherence to TJS, such as the council of elders. However, Article 2(4) of the Constitution limits this right if the custom or the conduct in relation to such custom is inconsistent with the Constitution. One of the challenges facing TJS is that the sentences imposed through TJS are sometimes contrary to human rights principles and the Constitution. These include beatings, banishment from communities, infliction of curses and mild punishments for serious human rights violations.⁴⁴ For example, when defilement cases are resolved by

⁴¹ Ozoemena, Hansungule, *Re-envisioning gender justice*, 5.

⁴² Dido AD, *Embracing the traditional justice systems in Northern Kenya: Prospects and challenges*, (29 October 2012).

⁴³ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 10.

⁴⁴ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 9.

traditional mechanisms, the families of the victims want to protect the dignity of the child therefore; they secretly deal with the issue.⁴⁵ Child marriages also disguise crimes such as defilement; however some customs recognise these unions and the perpetrators go unpunished.⁴⁶ This form of dispute resolution, which violates the rights of children clashes with the formal justice systems which have placed stringent laws and sanctions against perpetrators of such crimes. For instance, Section 8(2), (3) and (4) of the Sexual Offences Act,⁴⁷ provides for serious punishment for those found guilty of committing defilement. Under the Act, the punishment for defilement of a child 11 years and below will be liable to life imprisonment, for a child between 12 and 15 years will be liable for a sentence of not less than 20 years imprisonment and for a child between 16 and 18 years will be liable for a sentence of not less than 15 years imprisonment.

However, some forms of punishment which may appear to be repugnant are actually more of a deterrent to commission of crimes. People who adhere to such customs generally fear imposition of curses and banishment as a form of punishment compared to imprisonment. To them their very being and sense of belonging is the community and if banished or cursed they cannot enjoy community life.

The Constitution provides for the rights of special groups such as: women; children; persons with disabilities and; the youth. Usually, the composition of council of elders mostly includes old men because of the patriarchal societies. As such, persons from special groups are discriminated against as they cannot participate as council of elders and consequently, women raise concerns that the men discriminate against them during the dispute resolution processes.⁴⁸

However, it is worth noting that in Kenya, councils of elders do not all consist of men only. A case in point is the *Had Gasa* of the Orma - who are powerful as they impose severe punishment such as beatings and curses and the *Kijo* of the Pokomo - who have been influential in peace talks amongst conflicting communities.⁴⁹ Council of elders consisting of women only are also valued as they are sensitive when dealing issues facing women such as sexual and gender based violence.⁵⁰

⁴⁵ Ayuko B, Chopra T, *The illusion of inclusion: Women's access to rights in northern Kenya*, (December 2008) 2, http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Chopra_Illusion_of_Inclusion_Womens_A2_Rights_in_Northern_Kenya.pdf, on 15 May 2014.

⁴⁶ Ayuko, Chopra, *The illusion of inclusion*, 3.

⁴⁷ Act No. 3 of 2006.

⁴⁸ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 9.

⁴⁹ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 10.

⁵⁰ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 16.

Needless to say, traditional practices should conform to the Constitution and general human rights principles. As stated in the *Bhe* case, living customary law changes with time and with circumstances. The customary law like any living thing changes and that which applied to the fore fathers ought to develop and conform to the present time. This should be a driving force to develop customary law in line with human rights principles and in turn it will strengthen the TJS systems.

Comparative Analysis on Traditional Justice Systems in Kenya and South Africa

Like Kenya and other African countries, the colonisers in South Africa introduced the policy of indirect rule as a means to bridge the gap between their laws and the customary laws of the indigenous people.⁵¹ Thus, the present South Africa consists of a mixed legal system like Kenya.

The South African Constitution,⁵² recognises customary law as a source of law. Section 39(2) and (3) provides for the interpretation of the Bill of Rights and states that: “(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.” Section 2 of the South African Constitution enshrines the supremacy of the Constitution and states that any law inconsistent with it is invalid.

In the context of TJS, the South African Constitution is different from the Kenyan Constitution because Section 211 and 212 of Chapter 12 in the South African Constitution explicitly acknowledges the institution of traditional leadership. This is a unique Chapter of that Constitution because Section 211 recognises the institution of traditional leaders in relation to customary law and Section 212 provides for the role of traditional leadership in accordance with the Constitution and statute and urges the enactment of legislation to provide clear guidelines for this institution. Section 211 (3) is comparable to Article 159(2) (e) of the Kenyan Constitution, though it differs in wording. This Section provides

⁵¹ Department of Justice and Constitutional Development, South Africa, *Policy framework on the traditional justice under the Constitution*, (3 March 2009), 11, http://www.justice.gov.za/legislation/trad-courts/20090303_tradcourts.html on 11 May 2014.

⁵² No. 108 of 1996.

that: “(3) the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.” An analysis of these two Constitutions illustrates that there is a bold appreciation of customary law as part and parcel of the way of life of the diverse people. Both countries appreciate legal pluralism as several systems of law operate simultaneously. The challenges facing the formal and informal justice systems in these two countries are also similar.

One such challenge that South Africa has faced is the criticism evoked against the proposed Traditional Courts Bill of 2012.⁵³ This Bill was criticised because: first, it recreated the old Bantustan links and provided for boundaries which were demarcated during the apartheid regime and regulated by the 1950s legislations enacted to legislate the lives of black people only.⁵⁴ Second, the definition of customary law in the Bill was distorted. Since the Bill created the perception that the demarcations for the traditional courts would bind people to approach specific courts, yet, in actual fact customary law provides that traditional dispute resolution is voluntary and consensual and parties are generally at liberty to choose which traditional courts they wish to resolve their disputes.⁵⁵ Third, women criticised these traditional courts because they felt discriminated against by the predominantly patriarchal nature of the traditional leaders adjudicating in the courts.⁵⁶ Fourth, there was a lack of separation of powers with regards to the traditional leader heading the traditional courts.⁵⁷ Their roles included the legislative, administrative and judicial roles and this was contrary to the characteristic doctrine of separation of powers in the formal justice system.⁵⁸ Consequently, this Bill was never enacted. The criticisms against the Bill clearly outlines some of the challenges facing TJS. The question which arises is: is it necessary to legislate on TJS in light of the living customary law, which keeps changing?

The courts in South Africa have pronounced themselves on the role of traditional leaders and the development of customary law. Kenyan courts have also exercised their discretion and referred matters to TJS in land and property rights and criminal matters.

⁵³ Parliamentary Monitoring Group, *Traditional Courts Bill[B1-2012]: Briefings by University of Cape Town and deliberations on process* (2012), <http://www.pmg.org.za/report/20120530-traditional-courts-bill-briefings-uct-and-deliberations-process> on 10 November 2014.

⁵⁴ Parliamentary Monitoring Group, *Traditional Courts Bill[B1-2012]*.

⁵⁵ Parliamentary Monitoring Group, *Traditional Courts Bill[B1-2012]*.

⁵⁶ Parliamentary Monitoring Group, *Traditional Courts Bill[B1-2012]*.

⁵⁷ Parliamentary Monitoring Group, *Traditional Courts Bill[B1-2012]*.

⁵⁸ Parliamentary Monitoring Group, *Traditional Courts Bill[B1-2012]*.

Courts in Isiolo are at the forefront in terms of developing and adopting TJS as a form of alternative justice systems.⁵⁹ This is because the communities in that area find informal justice systems easily accessible, cheaper and faster in terms of delivery of justice. The communities in these areas are predominantly nomadic pastoralists thus, with this way of life; formal justice systems are difficult to access.

In *Republic v Mohamed Abdow Mohamed*,⁶⁰ the accused was charged with murder but he pleaded not guilty. However, the family of the deceased wrote to the Director of Public Prosecutions (DPP) stating that they wished to withdraw the case because it had already been settled by a council of elders. The DPP made an oral application to have the matter withdrawn and noted that the parties had expressed their wish to withdraw the matter as they had relied on traditional and Islamic law to arrive at a reconciliation which was in consonance with Article 159 of the Constitution. In arriving at a decision to withdraw the matter, the judge held that the Director of Public Prosecutions has the power to discontinue any criminal case against an accused and it was in the interests of justice to withdraw the matter. Proponents of the formal justice system have criticised this decision with some arguing that serious criminal matters such as murder should remain within the boundaries of the formal court process which are better equipped to deal with such crimes. Some have argued that the state has the duty to institute criminal proceedings after a complaint is made; therefore it is only fitting that the same state recognised formal process be allowed to deal with the crime.

This dilemma has raised the question: whether legislation should be enacted for TJS and if so, what would the subject matter be? Judicial officers actually support the concept of using TJS in civil matters such as family law and land and property rights. However, with regards to criminal matters, there are differing views on the capacity of TJS to deal with crime.⁶¹ Part of the reason is because some of the punishments given do not reconcile with the crimes committed.

The courts have welcomed TJS as a mechanism for dealing with disputes relating to land and property rights. In *Lubaru M'imanyara v Daniel Murungi*,⁶² land was in dispute, the parties consented to having the matter referred to the Meru council of elders known as the *Njuri Ncheke*. In arriving at its decision to refer the

⁵⁹ Judiciary Training Institute, *Convening draft report of the meeting of government officials on alternative justice system*, (14 November 2013).

⁶⁰ Criminal Case 86 of 2011; [2013] eKLR.

⁶¹ Judiciary Training Institute, *Convening draft report*.

⁶² Miscellaneous Application No. 77 of 2012, [2013] eKLR.

matter to the council of elders, the Court held that Articles 60(1)(g) and 159(2) (c) of the Constitution supports traditional dispute resolution as a mechanism to deal with land disputes. Similarly, in the case of *Seth Michael Kaseme v Selina K. Ade*,⁶³ the Court of Appeal took cognisance of the role of the Gasa Council of Elders of Northern Kenya to arbitrate a land dispute. These two cases illustrate the use of TJS in land and property disputes in Kenya. This is a unique dispute resolution mechanism which should be promoted in light of Kenya's historical injustices regarding land.

The landmark South African Constitutional Court decision of *Shilubana and Others v Nwamitwa*⁶⁴ addressed the role of customary law, traditional leadership and traditional dispute resolution mechanisms in light of the Constitution and the Bill of Rights. The main issue in this case was whether members of traditional leadership can adjust and develop their customs in line with the Constitution. The first applicant, a woman named Shilubana, was the first daughter of the ruling Chief, known as the *Hosi* of the Valoyi community of Limpopo Province in South Africa. In 1968, the *Hosi* died and since he did not have any sons, his younger brother Richard became the *Hosi*. However, in 1996, the Constitution of South Africa was enacted and the Valoyi Royal family met and in conformity with the principles enshrined in the Bill of Rights conferred chieftaincy on Shilubana. In spite of this, Shilubana declined to replace Hosi Richard, and only did so when he died.

A dispute arose between Shilubana and Nwamitwa, who argued that he was the one to take over the leadership. In the High Court, the judges held that only the royal family could recognise and confirm a *Hosi* and therefore, had no power to change the Valoyi custom and confer chieftaincy on another person. The Court also found that Shilubana could not be *Hosi* because of her lineage and not because of gender discrimination as argued. The Court further found that her father had died pre-1996 and had he died after the enactment of the Constitution, the situation would have been different. The Supreme Court of Appeal affirmed the decision of the High Court.

The Constitutional Court judges were of a different view, they held that the High Court and the Supreme Court of Appeal adopted a narrow focus in relying on the argument that a *Hosi* is not appointed but born and thus the lineage did not allow a shift in power from *Hosi* Richard to Shilubana. The Constitutional

⁶³ Civil Appeal 25 of 2012, [2013] eKLR.

⁶⁴ (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).

Court found that the two superior courts had failed to give consideration to the historical and constitutional context of traditional leadership in relation to customary law. In conclusion the Court held that Shilubana was the rightful chief and emphasised the need to develop customary law to be consistent with the Constitution. It held as follows:

“[81] ... customary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.”

This case illustrates that customary law can change and more so, traditional leaders can change customary law to conform it to the Bill of Rights and the Constitution. Thus, the lesson gleaned from this case is that patriarchal leaders can promote the rights of women where the customary laws do not favour them.

In another South African case, a decision of traditional leaders highlighted the conflict between customs and religious views.⁶⁵ In the unreported case of *Elizabeth Tumane and the Human Rights Commission v Bakgatla-ba-kgalefa and Kgosi Nyala Pilane*,⁶⁶ the *Bakgatla-ba-kgalefa*, traditional authority instructed a widow, Mrs. Elizabeth Tumane, from a village called Monono to sprinkle herbs known as *mogaga* in her pathway every time she left her house as part of a ritual to mourn her deceased husband. However, Mrs. Tumane refused to do so as this custom was contrary to her religious beliefs as a Jehovah's Witness. As punishment, the traditional authority ordered that she be confined in her yard for 12 months because if she interacted with people she would bring calamity to them. This illustrates a conflict between cultural rights and the right to exercise one's religion, both of which are protected under the South African Constitution. This case shows how traditional authorities might impose sentences and customary practices which conflict with other rights.

The two cases from these countries, though dissimilar illustrate some of the lessons and challenges regarding TJS. Several questions therefore arise: what are some of the solutions for including TJS in the formal system? What are some of the recommendations that can be made? Is there a need to legislate on TJS without interfering with customary laws? Should there be a hybrid system where TJS and formal systems work on parallel?

⁶⁵ Department of Justice and Constitutional Development, South Africa, *Policy framework on the traditional justice under the Constitution*, (March 3 2009), 27, http://www.justice.gov.za/legislation/trad-courts/20090303_tradcourts.html on 11 May 2014.

⁶⁶ Case No. 618 of 1998 in the High Court of South Africa (Bophuthatswana Provincial Division).

Recommendations

This paper has analysed the differences between informal and formal justice systems and the importance of TJS as an alternative justice system. The key argument is that legal pluralism supports the notion that other forms of dispute resolution should be allowed in order to deal with different disputes affecting different people who adhere to different legal systems. It has been noted that there are conflicting concerns on whether or not to allow TJS as an alternative to the formal justice systems especially in criminal matters and also whether it is possible to develop customary law so that TJS complies with the Constitution.

Another major concern which has been raised by proponents of formal justice systems is that there is no appeal system with regards to those adhering to TJS.⁶⁷ This is true, though practically, the situation is different because there is a referral system, through which a council of elders can refer a matter to a court and vice versa as indicated in the cases of *Lubaru M'Imanyaru* and *Seth Kaseme*. According to the Constitution, appeals only lie as a matter of law and so far neither the Constitution nor any statute provides for an appeal from council of elders. Therefore, the term referral is used instead of the word appeal.⁶⁸

There are many proposals for dealing with TJS and formal justice systems. One such proposal is a hybrid system where legislation is developed in order to regulate how TJS will be carried out and the inter relationship between TJS and formal justice systems. However, Kenya could face the same challenges as South Africa with regards to legislating on TJS. There are very many customary laws at play and synthesising all these laws, practices and procedures for conducting dispute resolution might be a tedious task. Muigua also argues that linking TJS and formal justice systems may derail the development of the former as the formal justice systems are likely to derail TJS with its characteristic formalities.⁶⁹ Further, there have been suggestions that members of the various council of elders should be paid by the State and recognised.

However, there are many challenges with this approach. Firstly, it is difficult to ascertain customary law since it is often unrecorded and passed down from generation to generation. Secondly, with the more than 40 ethnic groups in

⁶⁷ Judiciary Training Institute, *Convening draft report*.

⁶⁸ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 12.

⁶⁹ Muigua K, *Improving access to justice: Legislative and administrative reforms under the Constitution*, (2012), 5-7 <http://www.kmco.co.ke/attachments/article/110/A%20Paper%20on%20Improving%20Access%20to%20Justice%202.pdf> on 12 June 2014.

Kenya, it might be difficult to prove which council of elders is legitimate and the members entitled to sit on them. Thirdly, there is the challenge of ensuring that the respective council of elders complies with the principles stated in Article 10 of the Constitution and other human rights principles like equality and non-discrimination. The situation is not helped by the fact that most of these traditional justice systems are mainly constituted by men. Finally, it is important to reckon that resource allocation and policy making is primarily concentrated in the formal justice systems which may alienate traditional justice mechanisms.⁷⁰ Therefore, in order to develop TJS there is a need to direct resources in their development, as well as drafting of policy papers in relation to TJS.⁷¹

Ojwang, in his scholarly work rightly states that “the new constitution has reserved for the judiciary a central role, as a guarantor of public interest, and as purveyor of right and justice towards the citizen.”⁷² A reading of Article 159 of the Constitution indicates that courts are at the centre of administering justice and TJS is an ‘alternative’ where courts can refer the matters to such dispute resolution in the interest of justice. Yet again, practically, these courts face challenges such as backlog of cases and alternative justice systems such as TJS end up being the solution. TJS, on the other hand faces challenges such as a lack of adherence to human rights principles as enshrined in the Constitution.

Having all this in mind, it is proposed that awareness must be created on the option of TJS for those who cannot access formal justice systems for one reason or another. Judicial officers also need to be enlightened on the option of referring cases to TJS more so in family, private, misdemeanors and land dispute. However, people using TJS must also be educated on their rights,⁷³ as provided under the Bill of Rights in the Constitution and if the TJS mechanism does not adhere to such rights, then they have the option of referring the matter to the courts. Although courts have numerous challenges, these challenges do not negate the fact that the Judiciary is the constitutionally mandated guardian of justice.

Enactment of legislation to deal with TJS or combine TJS and formal justice systems might be an effort in futility. Though, it will not harm to enact legislation binding all TJS systems to adhere to the rights enshrined in the Bill of Rights and to regulate the system of referrals of cases between the formal justice systems and the TJS.

⁷⁰ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 6.

⁷¹ Muigua K, *Improving access to justice*, 4, 7.

⁷² Ojwang, *Ascendant judiciary in East Africa*.

⁷³ FIDA Kenya, *Report on traditional justice systems . . . Coast Province*, 24.

In conclusion, in thinking of ways to carry forward the need to embrace TJS systems it is important to bear in mind that injustices affect different people from all walks of life. Therefore, in a democratic state like Kenya, with a people, principles and values based Constitution; we need to embrace creative mechanisms of dealing with these injustices. Sen put it in different words when he states that we need to have ‘an accomplishment based understanding of justice’.⁷⁴ He states that

“the need for an accomplishment- based understanding of justice is linked with the argument that justice cannot be indifferent to the lives that people can actually live. The importance of human lives, experiences and realisations cannot be supplanted by information about institutions that exist and the rules that operate”.

Conclusion

In conclusion, TJS as a form of alternative justice system should be promoted in a legal pluralistic society. However, there is need for development in living customary law for it to be in tandem with the letter and the spirit of the Constitution. The Constitution is clear that the people have delegated their sovereign power and allocated it to the Judiciary as the guardian of justice. However, the Judiciary has its challenges and these challenges hinder it from effectively executing its mandate of guardianship. Thus, TJS plays a role as a support and an alternative in instances when access to the courts is difficult. In light of the differences in culture and traditions there is a need to create awareness with the people, judicial officers and adjudicators of informal justice systems in order to educate and instruct them about this other option of justice as well as the need to develop these other forms of justice.

⁷⁴ Sen, *The idea of justice*.